APPEAL NO. 040186
FILED FEBRUARY 27, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on January 12, 2004. With regard to the only issue before him the hearing officer determined that (employer) is the respondent's (claimant) employer for purposes of the 1989 Act.

The appellant (carrier) appeals, contending that the claimant is not an employee as defined in Section 401.012, of the employer, relying on income tax forms, and that the claimant is an independent contractor, analogizing the claimant's employment to that of a custodial service or lawn maintenance service. The claimant responds, urging affirmance of the hearing officer's decision.

DECISION

Affirmed.

The employer is an advertising and marketing firm employed by (a client company) to care for, maintain, and transport (client company mascot or mascot) and her calf to various fairs, shows, and marketing events. The employer's event marketing director hired the claimant to perform the required duties for the client company mascot. The claimant was paid $10.00 an hour to a maximum of a $100.00 a day. The claimant's pay was listed as nonemployee compensation on the Internal Revenue Service (IRS) form 1099. In addition to the pay, the claimant was provided a uniform with the client company logo (the employer paid for cleaning and maintenance of the uniforms), an employer credit card, employer business cards identifying the claimant as "Event Coordinator," and an employer cell telephone. The employer's Christmas cards include a picture of the claimant (and other undisputed employees) and her name. The claimant was told what events to go to, and the times the claimant was supposed to have the display completed. The employer's event marketing director and human resource director/comptroller both testified that they considered the claimant an employee. The only contrary evidence consisted of various IRS forms that identified the claimant's compensation as nonemployee compensation with no withholding for taxes, social security, or medicare. The hearing officer commented that while the claimant's arrangement may not have been proper for federal income tax regulations the payment for the claimant's "services is not controlling."

The carrier essentially argues that the IRS forms are controlling and analogizes the claimant's services as similar to a custodial contract or yard maintenance service contract. We disagree and observe that a custodial or yard maintenance service would not usually have the employer's credit card, cell phone, or employer's business cards, or have its name on the employer's company Christmas cards. Furthermore, how the employer (or claimant) are listed on the tax forms is not necessarily binding for workers'

compensation purposes, or for the IRS for that matter (as emphasized by individuals who have listed maids and housekeepers as independent contractors and have been challenged by the IRS).

We have reviewed the complained-of determination and conclude that the hearing officer's determination is not erroneous as a matter of law and not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **MARYLAND CASUALTY COMPANY** and the name and address of its registered agent for service of process is

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

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Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

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Robert W. Potts
Appeals Judge